IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.222 OF 2003

In the matter of Section 434 of the Companies Act, 1956

And

In the matter of M/s.Vaishali Aromatic (India) Pvt.Ltd. an incorporated Co. having its registered office at 30, MIDC, Chikalthana, Aurangabad - 431 210.

Deogiri Nagri Sahakar Bank Ltd.
a Co-operative Bank registered
under the provisions of Maharashtra
Co-op. Societies Act, 1960, and
carrying on business at Aarth
Complex, Kesar Singpura, Adalat
Road, Aurangabad-431 001, and
Branch Office at Mukund Wadi,
Plot No.10,d Mayanagar No.2,
CIDCO, Jalna Road, Aurangabad. ....Petitioner

Mr.B.B. Parekh for the Petitioner.

Mr.S.C. Naidu i/b C.R. Naidu & Co. for the Respondent - Company.

CORAM : S.J. VAZIFDAR, J.
DATED : 14TH OCTOBER, 2004.

ORAL JUDGMENT :

1. The Petitioner served a statutory notice dated 27th July, 2002. In the said notice, it is stated that the balance outstanding as on 6th December, 2001 was Rs.1,90,16,803/-. Mr.Naidu, the learned counsel appearing on behalf of the Company does not deny the fact that an amount in excess of Rs.80,00,000/- is due to the Petitioner.

2. Mr.Naidu however, submitted that the amount of Rs.1,90,16,803/- stated in the statutory notice is not accurate. He therefore submitted that the Company Petition is not maintainable. The argument is not well founded. There is nothing in Section 434 of the Companies Act, 1956 that warrants the view that merely because the amount stated to be due in the statutory notice is not the exact amount actually due to the Petitioner, a Petition for winding up is not maintainable.

3. Mr.Naidu relied upon the judgment of a learned single Judge of this Court in *Shantilal Khushaldas and Bros. v. Smt.Jayabala Suresh Shah, 1994 Mh.L.J. 432* Assuming the judgment supports Mr.Naidu’s contention it is per incuriam and impliedly

overruled. It is per incuriam in view of a judgment of the Division Bench of this Court in *Pfizer Limited v. Usan Laboratories Pvt.Ltd. 1985 Mh.L.J., 554.* It is impliedly overruled by a Division Bench judgment of this Court in *Tata Finance Ltd, Mumbai v. Kanoria Sugar and General Manufacturing Company Ltd., Mumbai, 2002 (1) Mh.L.J., 617.* Suffice it to refer to the following observations of the Division Bench from the judgement in Tata Finance Ltd.

> 11. ... "It is true that there is some dispute about the claim of enhanced lease rentals on account of disallowance of the claim of depreciation by the Income Tax department. There is, however, absolutely no dispute for the outstanding lease rentals which are in the range of nearly Rupees Thirty Lakhs. The terms of agreement are also very clear and in case of default, the company is liable to pay athe service charges. When a part of claim made by the creditor is seriously dispute but the remaining portion is prima facie appear to exceed the limit of Rs.500/- indicated in section 434 of the Act, It would be unjust to refuse wind up order on the ground taht there is dispute as to precise amount ownded. In re *Tweeds Garages Ltd., (1962) 1 Ch. 406;* it was clearly held that it would be unjust to refuse a winding up order to the petitioner who has admittedly owned moneys which have not been paid merely because there is a dispute as to the precise amount owning. Almost to the same effect are the observations in

> *Cardiff Preserved Coal and Coke Co. vs. Norton, (1867) 2 Ch. App.405.*
>
> 12. The learned single judge of Calcutta High Court in *Ofu Lynx Ltd. vs. Simon Carves India Ltd., (1971) 41 Comp Cas 174* has observed :
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> "I, therefore hold that a notice under section 434 of the Companies Act, 1956, will not be rendered invalid only because of the fact that the amount of debt mentioned in the notice may not be exactly correct aqmount of the debt due, provided the amount mentioned in the notice includes debt due and exceeds sum of Rs.500/-."
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> 13. The Judgment of single judge of Calcutta High Court has been cited with approval by the Division Bench of this Court in *Pfizer Ltd. vs. Usan Laboratories P.Ltd. 1985 Mh.L.J. 554 = 1985 (57) Comp Cas 236.* Therefore, merely because a part of the claim was disputed by the Company, the defence cannot be said to be legitimate and bona-fide."

3. Mr.Naidu also relied upon the following observation from the judgment of a learned single Judge of the Calcutta High Court, *In re Jambad Coal Syndicate Ltd. 1934, ILR 62, Calcutta, 294* :-

> "The law requires that a demand must be made for a debt that is due and it is not permissible to support a petition by alleging that something else is due."

The reliance upon this judgment is not well founded. It is clear from a reading of the judgment as a whole that

in that case the basis of the claim was different from the basis on which the Petitioner's therein sought to support their case. This is clear from what followed the above words relied upon by Mr.Naidu. The judgment reads as under :-

> "The company, therefore, cannot rely on any admission that Rs.13,000 and not Rs.72,000 is due under the former lease if it is in force, nor is it sufficient to allege that Rs.60,000 is due under the old lease.
>
> The demand was not made for rent or royalties under the old lease." (emphasis supplied)

4. The Companies liability is in respect of the corporate guarantee furnished by the Company for the dues of M/s.Vaishali Pigments Pvt.Ltd.

5. Mr.Naidu submitted that the Petitioner has already obtained a recovery certificate on 2nd March, 2001 under Section 101 of the Maharashtra Co-operative Societies Act against the principal borrower in the sum of Rs.1,85,00,000/-. He further submitted that the principal borrower has been paying the amounts in small instalments. This is however is no ground to deny the Petitioner its dues.

6. Mr.Naidu further submitted that the Company had made an offer for a one time settlement under the Reserve Bank of India guidelines. The proposal, he stated, offered a payment of about Rs.45,00,000/- within one year.

7. Mr.Naidu further alleged that the Petition was mala-fide as the Petitioner has not proceeded against the principal borrower despite the fact that it holds securities for payment of the said amount and despite the fact that the principal borrower owns a valuable immovable property.

8. From the above facts, it is clear that in any view of the matter and even as per the Companies own case, an amount of Rs.45,00,000/- is due and payable by the Company to the Petitioner. On the other hand, Mr.Parekh has not seriously disputed the fact that the principal borrower owns an extremely valuable immovable property.

9. In the circumstance, the following order is passed :-

i). The Company is directed to deposit Rs.45,00,000/- on or before 1st August, 2005.

ii). In the event of the amount being so deposited and in the event of the Petitioner filing a suit for recovery of the amount claimed in the petition within eight weeks of such deposit being made the amount shall stand transferred to the credit of the suit. In the event of the suit not being filed the amount shall be returned to the Company.

(iii) In case of failure on the part of the Company to deposit the aforesaid amount, the Petiton shall stand admitted and shall be advertised in the Free Press Journal, Navshakti and Maharashtra Government Gazette.

(vi). The Petitioner shall deposit an amount of Rs.2,000/- with the Prothonotary and Senior Master of this Court within four weeks from the date of default towards the cost of advertisement.

(v). The operation of this order is stayed for a period of twelve weeks from today to enable to the parties to carry the matter higher.

. Parties to act on an ordinary copy of this order duly authenticated by the Company

Registrar/Court Stenographer of this Court.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
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COMPANY PETITION NO.222 OF 2003

DATE OF DECISION : 14TH OCTOBER, 2004.

For Approval and Signature :

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)